In The

Supreme Court of the United States

October Term, 1996

SPORTING CLUB ACQUISITIONS, LTD.,
Petitioner,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the respondent act outside the scope of its authority in permitting a post-auction assignee to exercise the right of first refusal at issue?

2. Does the decision of the Court of Appeals for the Tenth Circuit conflict with other circuits' decisions regarding what constitutes fair and consistent treatment of offerors at auctions?

3. Did the Court of Appeals make an error of material fact in holding there was no evidence that recognizing a post-auction assignment of the right of first refusal at issue lured competition away from the bidding process?

4. Did the Court of Appeals make an error of material fact in concluding the FDIC's actions were being viewed in hindsight?

PARTIES TO THE PROCEEDING

The petitioner, Sporting Club Acquisitions, LTD., is a Colorado limited partnership. It was the plaintiff in the lower-court proceedings of this case and the appellant before the United States Court of Appeals for the Tenth Circuit.

The respondent, the Federal Deposit Insurance Corporation, is a corporation organized under the laws of the United States and is an agency of the United States government. It was the defendant in the lower-court proceedings of this case and the appellee before the United States Court of Appeals for the Tenth Circuit.

There are no other parties to this action; however, the following parties may have a financial interest in its outcome:

Olympia and York Cherry Creek Company, which is a Colorado limited partnership and the original holder of the right of first refusal at issue.

Carl T. Millice, Carl R. Zeipprecht, and Joseph J. Branney, who are the parties which acquired and exercised the right of first refusal at issue.

500 South Cherry, L.L.C., Carl T. Millice, manager, which is a Colorado limited liability company and was the ultimate purchaser of the subject property.

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On November 25, 1995, the United States Court of Appeals for the Tenth Circuit issued its opinion affirming the District Court's decision (see slip opinions in the appendix).

STATEMENT OF JURISDICTION

The petitioner seeks review of the order and judgment issued on November 25, 1995 by the United States Court of Appeals for the Tenth Circuit, pursuant to the certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254(1). On January 31, 1996, the Court of Appeals denied the petition for a rehearing of this decision *en banc*.

STATUTES INVOLVED

12 U.S.C. 1821(d)(13)(E):

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which --

(I) maximizes the net present value return from the sale or disposition of such assets;

(I) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors; and

(iv) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

12 U.S.C. 1821(d)(2)(G)(I)(II):

The Corporation may, as conservator or receiver --

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

STATEMENT OF THE CASE

As receiver for a failed savings and loan association, the respondent (the "FDIC") acquired The Cherry Creek Sporting Club ("the Club") through a public trustee's deed and offered it for sale at a public auction with open bidding. The auction sale agreement said the sale was subject to a right of first refusal (the "Right") held by a third party, Olympia and York ("O&Y"). The Right required the prior owners to give O&Y 30 days to purchase the Club on the same terms and conditions as set forth in any bona-fide offer. The sale agreement said the FDIC would treat the high bid as such an offer and notify O&Y so that it could exercise the Right. The agreement also said the FDIC would disclose all changes in the auction's terms and conditions, but the FDIC never disclosed that a post-auction assignee could exercise the Right.

SCA was the high bidder, its bid was accepted, it executed the sale agreement, and O&Y was notified of the bid. O&Y then contacted SCA and offered to sell the Right for $250,000, which SCA did not accept. Shortly thereafter, O&Y assigned the Right to a group (the "Assignees") which included at least one person who had intended to bid for the Club. The FDIC then notified SCA that the agreement was terminated because these Assignees had exercised the Right. The FDIC also offered them the same financing that was offered to SCA.

On February 11, 1994, SCA filed suit against the FDIC in the Federal District Court for the District of Colorado, basing jurisdiction on 12 U.S.C. §1819, as the FDIC is a corporation organized under federal law, with the power to make contracts, sue and be sued, and complain and defend in any court. SCA asked for specific performance and/or damages, claiming that by allowing the Assignees to exercise the Right and financing their purchase, the FDIC breached its contract with SCA, violated its fiduciary duty toward SCA, and violated its statutory requirement to treat all offerors fairly and consistently. The FDIC filed a motion to dismiss the specific-performance claim, which was granted. Both parties filed motions for summary judgment on the remaining claims, and judgment was granted to the FDIC. SCA then appealed to the Court of Appeals for the Tenth Circuit, which affirmed this decision. SCA petitioned for a rehearing *en banc*, which was denied on January 31, 1996.

SUMMARY OF THE ARGUMENT

Permitting a post-auction assignee to exercise the Right violated the FDIC's statutory directive to sell its assets in a way that maximizes the sale price, ensures adequate competition, and is fair and consistent to every offeror. The Court of Appeals conceded that what the FDIC did could have undermined the auction's profitability by luring bidders away; however, the Court erred in saying SCA cited no evidence this happened, because the Assignees were obviously one such party. Furthermore, had the FDIC disclosed -- as it should have -- that a post-auction assignee could exercise the Right, this would have resulted in a bidding war for the Right itself instead of the Club, because doing otherwise would have needlessly driven up the high bid.

The FDIC's action also resulted in the Assignees acquiring several substantial advantages over every other offeror, which ultimately allowed them to acquire the Club without any competition (i.e., bidding for it). The FDIC would not have complied with its statutory mandate even it had disclosed that a post-auction assignee would be permitted to exercise the Right, because only a post-auction assignee would have had these advantages. The Court of Appeals said this argument had no merit, yet the Court gave no reasoning and its decision appears to conflict with those of other circuit courts regarding the fairness of auctions.

The Court of Appeals also said the FDIC did not violate its statutory directive because its action was only an error in judgment. This directive was mandatory, however, and therefore the FDIC had no discretion to permit a post-auction assignee to exercise the Right if doing so would have had any of the results the statute prohibited. Even if this directive was not mandatory, the FDIC still violated it because this was not a mere error in judgment; it was a *deliberate* failure by the FDIC to comply with the directive.

ARGUMENT

1. Permitting a post-auction assignee to exercise the Right failed to maximize the Club's sale price or ensure adequate competition among all offerors.

The FDIC must sell its assets in a way that maximizes the sale price and ensures adequate competition among all offerors. 12 U.S.C. §1821(d)(13)(E). *See also Gosnell v. FDIC*, 938 F.2d 373, 376 (2nd Cir. 1991)(bidders are offerors). The Court of Appeals conceded that permitting a post-auction assignee to exercise the Right could have undermined the auction's profitability by luring offerors away from the auction; however, the Court's conclusion that there was no evidence of this was clear error. SCA cited pre-auction correspondence between the FDIC and one of the Assignees as proof of their intention to bid,[1] but instead they decided to acquire the Club by purchasing and exercising the Right, rather than bidding in the auction with every other offeror. Obviously, they were at least one party who was lured away from the auction by the FDIC's decision, **otherwise there would not be any basis for this lawsuit**. Furthermore, O&Y offered to sell the Right to SCA for $250,000, and one can reasonably assume O&Y made this same offer to the Assignees. This amount should and would have gone to the FDIC, since the Assignees were obviously willing to pay that much more for the Club.

The FDIC put itself in a very difficult position by deciding to permit a post-auction assignee to exercise the Right. Not only was the FDIC statutorily required to maximize the sale price and ensure adequate competition, the FDIC also committed itself to disclosing any changes in the auction's terms. This decision was such a change; however, if the FDIC made this disclosure, no offerors would have bid for the Club at the auction (since that would have needlessly driven up the high bid), but instead they would have bid for the Right from O&Y. *See Ferrero Construction Corp. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1144 (Md. App. 1988)(recognizing rights of first

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1. The FDIC has *never* contested this fact, nor is it even mentioned in the uncontested facts of the Court of Appeals' decision (Appx. B).

refusal at auctions deters bidders). **In effect, the FDIC would have been disclosing how to acquire the Club without bidding for it – just as the Assignees did.** Regardless of this disclosure, however, this decision prevented the FDIC from complying with its statutory requirements because any offeror who wanted to do what the Assignees did would obviously not have bid, thus diminishing competition and preventing maximization of the sale price. The entire situation could have been avoided if the FDIC had used its express statutory authority and not recognized the Right in the first place.[2]

2. Permitting a post-auction assignee to exercise the Right was unfair and inconsistent treatment of every other offeror.

The FDIC must also sell its assets in a way that ensures the fair and consistent treatment of every offeror. 12 U.S.C. §1821(d)(13)(E) and *In re Hourani*, 180 B.R. 58, 67 (Bkrtcy. S.D.N.Y. 1995). By permitting a post-auction assignee to exercise the Right, however, the FDIC violated this statute, **because then the Assignees had the following substantial advantages over every other offeror:** they knew the high bid and whether they could afford to match it before deciding to buy the Right, they avoided the risk of being outbid by other offerors, and they had substantial additional time to obtain the down-payment financing. Since only a *post*-auction assignee would have had these advantages, the FDIC would not have satisfied its statutory mandate even if it had disclosed (which it didn't) that a post-auction assignee would be permitted to exercise the Right. Also, the FDIC represented that the Club would be sold *at the auction*, which meant any offeror who wanted the Club would have had to *bid* for it; however, the FDIC's action allowed the Assignees to acquire the Club without bidding for it in competition with every other offeror.

Even though the FDIC's action was an obvious and blatant violation of §1821(d)(13)(E), the Court of Appeals said SCA's argument had no merit, without giving any rationale for this conclusion. The Court's decision also appears to be in

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2. See 12 U.S.C. 1821(d)(2)(G)(I)(II).

direct conflict with the following federal decisions establishing guidelines for determining the fair and consistent treatment of bidders at auctions: *In re Chun King, Inc.*, 753 F.2d 547, 551 (7th Cir. 1985)(unfairness and stifling of competition will defeat sale confirmation); *In re Transcontinental Energy Corp.*, 683 F.2d 326, 328 (9th Cir. 1982)(the appearance of impropriety will set aside even a fair auction); *Quinn v. S.S. Jian*, 235 F.Supp. 975, 977 (D.Md. 1964)(all bidders should have equal opportunities); and *Raleigh and C.R. Co. v. Baltimore National Bank*, 41 F.Supp. 599, 601 (E.D.S.C. 1941)(unfairness is evidenced by the purchaser taking any undue or unfair advantage). Therefore, upholding the FDIC's action was another clear error by the Court.

3. 12 U.S.C. §1821(d)(13)(E) is a mandatory directive.

The Court of Appeals again erred in holding the FDIC's decision to permit a post-auction assignee to exercise the Right was not an illegal act under 12 U.S.C. §1821 (d)(13)(E), even though this may have been an error in judgment. This statute clearly says the FDIC "shall" sell or dispose of its assets in a certain manner, and where the word "shall" appears in a statutory directive, Congress has chosen the strongest word to express its intent that the specified action be mandatory. *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 (6th Cir. 1993). Statutory language that an act "shall" be carried out is generally regarded as mandatory, especially when the statute's purpose is the protection of public or private rights. *South Carolina Wildlife Federation v. Alexander*, 457 F.Supp. 118, 130 (D.C.S.C. 1978). Statutes are mandatory when regarding them as directory would result in serious impairment of the public or private interests they were intended to protect. *Escoe v. Zerbst*, 295 U.S. 490, 494, 55 S.Ct. 818, 820 (1935). Therefore, **the FDIC did not have the discretion to permit a post-auction assignee to exercise the Right if this could have had any of the results prohibited by the statute.**

Even if the directives imposed by §1821(d)(13)(E) are not mandatory, the Court of Appeals was still wrong in calling the FDIC's decision a mere error in judgment. Contrary to what the Court said, this decision was not being viewed in hindsight because *months before the auction the FDIC was*

alerted to the potential problems of recognizing the Right.[3] Furthermore, the FDIC was *never* obligated to recognize the Right, because it has the express authority to ignore such restrictions on the transfers of its assets in order to ensure compliance with these directives.[4] Consequently, the FDIC's decision was a *deliberate* refusal to comply with these directives, which was an abuse of its discretion and therefore outside of its powers. *See Wilder v. Prokop*, 846 F.2d 613, 619 (l0th Cir. 1988). Under these circumstances, the Court's decision would effectively insulate the FDIC from any liability or responsibility under §1821(d)(13)(E), yet another decision of the Court says statutes must be construed to effectuate their intent and beneficial purposes, not to defeat them. *Colorado Health-Care Assn. v. Colorado Dept. of Social Services*, 842 F.2d 1158, 1171 (10th Cir. 1988).

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3. SCA's attorney wrote two letters to the FDIC explaining these problems and including a citation of several cases holding that foreclosure sales do not activate rights of first refusal that are to be effective only upon the grantor's expression of an intent to sell (there are *no* contrary cases). The FDIC never responded to these letters.

4. See 12 U.S.C. 1821(d)(2)(G)(I)(II).

CONCLUSION

Permitting a post-auction assignee to exercise the Right violated the FDIC's *mandatory* statutory directives to conduct the auction in a manner which maximized the sale price, ensured adequate competition, and was fair and consistent to every offeror. Because of this action, the Assignees were afforded substantial advantages over every other offeror, and they were allowed to acquire the Club *without bidding for it* in competition with every other offeror. The decision of the Court of Appeals affirming the FDIC's actions undermines the very purpose of this statute and conflicts with the decisions of other federal circuit courts establishing guidelines for determining the fairness of auctions. Consequently, the petitioner asks this Court to declare the FDIC's actions to have been in violation of the directives set forth in 12 U.S.C. §1821(d)(13)(E) and resolve the conflict between the Tenth Circuit and the other judicial circuits.

Respectfully submitted, this 26th day of April, 1996.

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APPENDIX A -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, Entered January 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 94-1567

SPORTING CLUB ACQUISITIONS, LTD.,
Plaintiff-Appellant,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION
Defendant-Appellee.

ORDER
Entered January 31, 1996

Before MOORE, BARRETT, AND WEIS,** Circuit Judges

**Honorable Joseph F. Weis, Jr., Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk
S/ Audrey F. Weigel,
Deputy Clerk

APPENDIX B -- ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, Entered November 25, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 94-1567
(D.C. No. 94-B-360 (D. Colo.))

SPORTING CLUB ACQUISITIONS, LTD.,
Plaintiff-Appellant,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION
Defendant-Appellee.

ORDER AND JUDGMENT*

Before MOORE, BARRETT, AND WEIS,** Circuit Judges

**Honorable Joseph F. Weis, Jr., Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

After examining the briefs and appellate record, his panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Sporting Club Acquisitions, Ltd. (SCA) brought this action for specific performance and compensatory relief against the Federal Deposit Insurance Corporation (FDIC) based on allegations of fraud, breach of contract, and breach of fiduciary duty. The district court dismissed without prejudice SCA's specific performance claim for lack of jurisdiction under 12

U.S.C. § 1821(j), which prohibits courts from taking "any action...to restrain or affect the exercise of power or functions of the [FDIC in its capacity] as a conservator or a receiver." Concerned lest this jurisdictional dismissal constrain what arguments could be (re)urged on the merits, SCA moved for clarification on the point, which was summarily denied. Thereafter, SCA dropped its fraud claim and the district court entered summary judgment for FDIC on the breach of contract and fiduciary duty claims. SCA now appeals these adverse rulings. As explained below, we affirm for substantially the reasons stated by the district court.

We say, "substantially," in part because our affirmance of summary judgment for FDIC on the merits of SCA's substantive claims moots some of the issues before us. Without a viable claim to provide a basis for the specific performance requested, any opinion we might express on the availability of such relief in light of § 1821(j) would be purely advisory. Further, since we consider all of the arguments against summary judgment asserted by SCA on appeal, including any he district court may have deemed barred by virtue of its order denying injunctive relief, our affirmance obviates resolution of SCA's objection regarding the denial of its motion for clarification. We turn, then, to the dispositive question of summary judgment.

The basic federal principles governing our review were recently summarized in terms particularly appropriate here:

> We review a district court's grant of summary judgment de novo and apply the same legal standard used by the district court. Under [Fed. R. Ci. P.] 56(c), summary judgment is appropriate only if the record, viewed in the light most favorable to the party resisting the motion, reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A fact is material if it might affect the outcome of the suit under the governing law, and a genuine issue exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.
>
> Moreover, as a federal court sitting in diversity jurisdiction, our role is to ascertain and apply the proper state law, here that of [Colorado], with the goal of insuring that the result obtained is the one that would have been reached in the stat courts. We review de novo he district court's construction of Colorado law, affording no deference to its conclusions.

Occusafe, Inc. v. EG&G Rocky Flats, Inc., 54 F.3d 618, 621 (10th Cir. 1995)(citations and quotations omitted).

The uncontested facts material to SCA's contract claim are set out in the district court's order and, again, in the parties' briefs, and will be recited only in summary here. In its capacity as receiver, FDIC acquired title to a sporting club, encumbered by a first right of refusal and purchase option held by Olympia and York (O&Y). FDIC offered the property -- expressly subject to O&Y's first right -- at a public auction, informing participants that seller financing would be available to qualified successful bidders. After entering the successful bid, SCA executed a purchase and sale agreement with FDIC, conditional upon the nonexercise of O&Y's first right. FDIC then gave the requisite notice to O&Y, which did not wish to purchase the sporting club. However, O&Y assigned the first right to a third party, which notified FDIC that it would exercise the right and buy the property. In accordance with the conditional purchase and sale contract with SCA, FDIC informed SCA that the first right had been exercised and terminated the contract. FDIC sold the property to the third party on equivalent terms, including seller financing.

The parties' dispute focuses on the interpretation of contractual documents, which, as we consider the operative terms unambiguous, involves a pure question of law, *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984). SCA maintains FDIC (1) breached their purchase and sale contract by selling the sporting club to O&Y's post-auction assignee, and (2) violated the terms of the auction by providing seller financing in connection with that nonbid sale. The district court rejected SCA's claims based on its conjunctive consideration of he purchase and sale contract and the first right to which it expressly refers. We agree with the district court's analytical approach, *see In re Application for Water Rights of Town of Estes Park v. Northern Colo. Water Conservancy Dis.*, 677 P.2d 320, 327(Colo. 1984)("When necessary to ascertain

the agreement of the parties, separate instruments that pertain to the same transaction should be read together...even though they are not executed by the same parties."); *see also Hein Enters., Ltd. v. San Francisco Real Estate Investors*, 720 P.2d 975, 980 (Colo. Ct. App. 1985)(where contract was expressly made subject to instrument containing right of first refusal, such right deemed part of contract as a matter of law), and affirm the conclusions reached thereby.

Although donning various legal guises, SCA's primary argument essentially consists of one naked assertion: where the purchase and sale contract acknowledges that it may be nullified by "the party entitled to exercise the First Right of Refusal (the "Right Holder")," *see* App. at 106, this reference to the right holder, though unqualified, must be understood as tacitly modified by some such phrase as "at the time the operative purchase offer is communicated," thereby precluding O&Y's assignment of the first right after learning of SCA's bid. Recognizing that a property interest of the sort involved here is presumed freely assignable absent an express prohibition, *see Scott v. Fox Bros. Enters.*, 667 P.2d 773, 774 (Colo. Ct. App. 1983)(recognizing presumption as to real estate option, relying on *Clark v. Shelton*, 584 P.2d 857 (Utah 1978), a first right of refusal case); *see, e.g., Hein Enters.*, 720 P.2d at 978-80 (acknowledging proper exercise of first right of refusal by assignee), and noting the lack of any pertinent limitation here, the district court held as a matter of law that FDIC did not breach the purchase and sale contract by permitting O&Y's post-auction assignee to exercise the first right. In our view, the district court correctly insisted on enforcing the purchase and sale agreement according to is plain terms. *See People v. Johnson*, 618 P.2d 262, 266 (Colo. 1980).

SCA next argues that if the purchase and sale contract's reference to the first right is so understood, the contract violates 12 U.S.C. §1821(d)(13)(E), which directs FDIC to "conduct its operations in a manner which -- (I) maximizes the net present value return from the sale of disposition of such assets[acquired in its receivership capacity]; [and]...(iii) ensures adequate competition and fair and consistent treatment of offerors." The district court did not address this objection. FDIC's response that SCA lacks standing to enforce such statutory directives by

private right of action misses the point (or at least the finer point) of SCA's objection, i.e., that under a long-standing principle of construction, FDIC's interpretation of the contract, being unlawful, should be rejected in favor of the legal alternative proposed by SCA. *See, e.g., Great W. Producers Coop. v. Great W. United Corp.*, 613 P.2d 873, 878 (Colo. 1980); *Wyatt v. Larimer & Weld Irrigation Co.*, 33 P. 144, 149 (Colo. 1893).

That said, the onus was on SCA to establish the asserted illegality of FDIC's interpretation of the contract, *see National Cigarette Serv. Co. v. Farr*, 594 P.2d 603, 605 (Colo. Ct. App. 1979), and it failed to do so. FDIC's intention of honoring the first right was disclosed before the auction, enabling all participants to weigh the comparative advantages of bidding on the sporting club directly or attempting to obtain the property indirectly through assignment of the first right from O&Y. And while, perhaps, permitting post-auction assignment of the first right may have been financially unwary, in that it could conceivably have undermined the auction's profitability by luring financial competition away from the bidding process (though there is no evidence that in fact happened here), SCA has not cited any authority indicating an arguable error in judgment constitutes an illegal act under §1821(d)(13)(E). Indeed, if it did, every contractual arrangement with FDIC would involve enormous uncertainty -- any misjudgment, oversight, or miscalculation revealed in hindsight as potentially detrimental to FDIC could lead to charges of illegality and consequent reformation or rescission of the transaction.

The district court fully considered and properly rejected SCA's contention that FDIC violated the terms of the auction by offering seller financing to O&Y's assignee. The contract specifically governing the purchase and sale between SCA and FDIC superseded any prior, general understandings regarding the conduct of the auction.1 As discussed above, that contract must be construed in conjunction with the first right, which expressly permits the holder "to elect to purchase the Property upon the same terms and conditions as are set forth in the [operative] Offer." App. At 105 (emphasis added). Since SCA's offer contemplated seller financing, the same was properly made available to the first right holder as well.2

Finally, we affirm the district court's holding that FDIC did not owe any fiduciary duties to SCA. Such duties do not arise as a matter of course between buyer and seller, *see Russell v. United Underwriters, Ltd.*, 228 F.Supp. 757, 762 (D. Colo. 1964); *Long v. Towne*, 639 P.2d 528, 530 (Nev. 1982)(citing cases for general rule), or between borrower and lender, *see First Nat'l Bank v. Theos*, 794 P.2d 1055, 1060 (Colo. Ct. App.), *cert. Denied* (July 30, 1990). SCA has not established the existence of any special circumstances indicative of a fiduciary relationship *See id.*, at 1060-61; *see also Moses v. Diocese of Colo.*, 863 P.2d 310, 321-22 (Colo 1993), *cert. Denied*, 114 S.Ct. 2153 (1994).

We have reviewed the arguments advanced by SCA on appeal and, whether expressly addressed or rejected without comment, they are all found to be without merit. The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Joseph F. Weis, Jr.
Senior Circuit Judge

1. The auction brochure specifically informed participants that the terms of the purchase and sale contract awarded to the successful bidder "will control the sale and purchase of each Property and that the same will supersede this catalog's terms and conditions." App. at 99.

2. We also note that while the auction brochure offered seller financing to qualified bidders, it did not state that this offer somehow precluded FDIC from providing such financing in accordance with the terms of the first right incorporated in the applicable purchase sale contract.

APPENDIX C – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, Entered November 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-B-360

SPORTING CLUB ACQUISITIONS, LTD.,
Plaintiff,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant.

JUDGMENT

PURSUANT TO and in accordance with the Order signed on November 15, 1994, by the Honorable Lewis T. Babcock, United States District Judge, it is

ORDERED that upon motion of plaintiff, its claim for fraudulent misrepresentation is dismissed. It is

FURTHER ORDERED that judgment is entered in favor of defendant, Federal Deposit Insurance Corporation, and against the plaintiff, Sporting Club Acquisitions, Inc. on all remaining claims, and this action is dismissed with prejudice. It is

FURTHER ORDERED that defendant is awarded its costs upon the filing of a bill of costs within ten (10) days of the entry of judgment.

DATED at Denver, Colorado, this 15th day of November, 1994.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK
s/ Stephen P. Erlich
Chief Deputy Clerk

APPENDIX D – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, Entered November 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-B-360

SPORTING CLUB ACQUISITIONS, LTD.,
Plaintiff,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant.

ORDER

Presently before this court are cross-motions for summary judgment filed by plaintiff Sporting Club Acquisitions, Ltd (SCA) and defendant Federal Deposit Insurance Corporation (FDIC). The motions are adequately briefed and oral argument will not materially aid their resolution. On motion of SCA, I dismiss its claim of fraudulent misrepresentation. I conclude that summary judgment should be granted in favor of FDIC and against SCA on all the remaining claims.

I.

In February, 1993, the FDIC, acting as receiver for Silverado Banking, acquired title to the Cherry Creek Sporting Club (Club) through a public trustee's deed. Initially, the FDIC attempted to sell the Club at a sealed bid auction. The highest bid was $2,500,000 which the FDIC did not accept. On December 14, 1993, the FDIC offered the Club at an auction which had open bidding whereby each bid was made known to the other bidders who could then submit a higher bid. SCA was the successful bidder at the second auction entering a bid of

$4,100,000. SCA and the FDIC executed a Purchase and Sale Agreement (P&S) for the Club contingent on the availability of seller financing from FDIC. The auction materials stated that seller financing would be available on the auction properties. The materials also stated that seller financing would be available to "qualified successful bidders." (Def. Exh. G "FDIC National Real Estate Auction Catalog of Properties").

The Club was sold subject to a "First Right of Refusal, Option to Purchase and Declaration of Restrictive Covenant" (Right) which was recorded in the property records of Arapahoe County, Colorado. Before the auction, SCA was provided with and reviewed the Property Information Packet (PIP) for the Club which included a copy of the Right. Pursuant to the Right, after SCA's bid was accepted and the P&S was signed, the FDIC gave notice to the holder of the Right, Olympia and York (O&Y) of SCA's offer to purchase the Club. O&Y then contacted SCA and offered to sell SCA the Right for $250,000 which SCA declined. O&Y then assigned the Right to another group which notified the FDIC it was exercising the Right. The FDIC immediately informed the SCA that the Right had been exercised, terminated the P&S and refunded SCA's earnest money. The FDIC subsequently closed the sale to the holder of the Right which included seller financing from FDIC on the same terms as had been offered to SCA.

SCA filed this action seeking specific performance and damages for breach of contract, fraud, and breach of fiduciary duty. I dismissed the claim for specific performance on June 21, 1994 for lack of jurisdiction pursuant to 12 U.S.C. §1821(j). In its motion for partial summary judgment, SCA "confesses to judgment" its claim for fraudulent misrepresentation and asks that this claim be dismissed. I will grant this motion. Remaining for consideration is the breach of contract claim based on FDIC's recognition of the Right, the breach of contract claim based on FDIC's providing the holder of the Right the same seller financing offered to SCA, and the breach of fiduciary duty claim.

II.

Fed.R.Civ.P. 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex*, 477 U.S. at 323; *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. U.S.*, 622 F.2d 516, 519 (10th Cir. 1980); Fed.R.Civ.P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves." *Celotex*, 477 U.S. at 324.

Summary judgment is also appropriate when the court concludes that no reasonable juror could find for the non-moving party based on the evidence present in the motion and response. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The operative inquiry is whether, based on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). However, summary judgment should not enter if, viewing the evidence in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party. *Anderson Liberty Lobby, Inc.*, 477 U.S. at 252; *Mares*, 971 F.2d at 494.

III.

Breach of Contract-Recognition of Right of First Refusal

The parties each seek summary judgment on plaintiff's claim of breach of contract based on FDIC's recognition of the Right held by the group which purchased it from O&Y. SCA claims that the P&S defined the "Right Holder" as O&Y and therefore, the only party who could exercise the Right was

O&Y. Thus, SCA claims the FDIC breached the P&S by allowing O&Y's assignee to exercise the Right. I disagree.

The following facts are undisputed. SCA knew well in advance of the FDIC auction that the property they were interested in buying was subject to a right of first refusal (Def.Brief Exh.E p.31-32). The FDIC disclosed to all prospective bidders, including SCA, both the existence of the Right and that the FDIC intended to afford the right holder the opportunity to exercise the Right. Before the auction, SCA received and reviewed the Property Information Packet (PIP)(Def.Exh.B) which included a copy of the Right (Def.Brief Exh. E p. 31-32) and noted the Right as an exception to title. (Def.Brief. Exh. P.26). SCA also had notice that the Right was recorded in the Arapahoe County real property records. Also, the P&S signed by the FDIC and SCA contained the following section:

Section 23. Right of First Refusal/Closing

The seller and Purchaser acknowledge that the Property is subject to that certain First Right of Refusal, Option to Purchase and Declaration of Restrictive Covenant dated June 3, 1981 (the "First Right of Refusal") by and between Jack Naiman, as Trustee, and David L. Johnson and Olympia & York Cherry Creek Company, a Colorado limited partnership, and recorded on June 4, 1981, in Book 3425 at page 460 of the real property records of Arapahoe County, Colorado.

Seller agrees that promptly upon execution of the Agreement by both Seller and Purchaser and the payment by Purchaser of the Earnest Money, Seller shall submit the Agreement and a description of the identity of the purchaser to the party entitled to exercise the First Right of Refusal (the "Right Holder") pursuant to the terms of the First Right of Refusal. If the Right Holder timely exercises its right to purchase the Property, the parties agree that: (I) such exercise shall not be deemed a default under the Agreement; (ii) the Agreement shall terminate; and (iii)

> Seller shall return the Initial Deposit and the Earnest Money to the Purchaser. If the Right Holder does not timely exercise its right to purchase the Property, then Seller and Purchaser agree to close the sale as set forth in the Agreement, but in no event later than 110 days after the Effective Date. Except for purposes of calculating when the payment of the Earnest Money is due, Seller and Purchaser agree that the "Effective Date" under the Agreement shall be the first business day after the last date on which Right Holder may exercise the First Right of Refusal.

(Def. Exh. F)

During depositions, Russell Cline, one of SCA's partners, was asked whether he was ever informed that O&Y would *not* be allowed to assign or sell the Right. He answered "No, we were never informed of anything like that." (Def.Brief Exh.E p. 59) Cline also testified that he "under[stood] that we needed to exercise due diligence in...purchasing the property." (Def.Exh. E p. 16)

A right of first refusal is a property interest which, unless otherwise provided, is fully alienable, transferable, and assignable. *Ochsner v. Langendorf*, 115 Colo. 453, 175 P.2d 392 (1946). Generally, the law favors the assignability of contractual rights. This is particularly true of interests in real property since free alienation is one of the "essential attributes of common-law property ownership." *Scott v. Fox Bros. Enterprises, Inc.*, 667 P.2d 773 (Colo. App. 1983); *see also Board of County Comm'rs v. Pfeifer*, 190 Colo. 275, 546 P.2d 946 (1976). Also, in the absence of a provision forbidding assignment, a real estate option contract is presumed to be assignable. *Scott v. Fox*, 667 P.2d at 774.

In this contract there was no express provision limiting the assignability or transferability of the Right. To reach the result sought by SCA, I would have to add language to the contract forbidding assignability of the Right. I decline to rewrite the contract by implying such a provision. I cannot presume that the parties intended to add such an important condition by implication or by silence. *See KN Energy, Inc. v. Great Western Sugar Co.*, 698 P.2d 769, 777 (Colo. 1985); *see*

also 3 Corbin on Contracts § 592 at 554-55 (1960).

I conclude as a matter of law that the FDIC did not breach the contract by recognizing the assignability of the Right. Accordingly, I will grant summary judgment on behalf of FDIC and against SCA on the breach of contract claim based on recognition of the Right.

Breach of Contract - Offering Financing to a Non-Bidder

The parties also seek summary judgment on plaintiff's claim of breach of contract based on FDIC's offer of financing to the Right assignee. SCA claims that seller financing was available only to "qualified successful bidders" pursuant to the "Auction Agreement." (Plaintiff's exh. A). I disagree.

SCA characterizes the "Auction Agreement" as a separate contract between the FDIC and itself. (Plaintiff's Brief p. 12) FDIC disputes that there was such a contract. (Def. Brief p. 13). However, this dispute does not create a genuine issue of material fact because the dispute disappears when the pertinent law is applied.

There is no dispute that the P&S contains the following integration clause:

> **Section 16. <u>Entire Agreement; Interpretation; Severability; Memorandum of Agreement; Miscellaneous</u>.**
>
> **(A) THIS AGREEMENT, INCLUDING ALL EXHIBITS HERETO, IS THE ENTIRE AGREEMENT BETWEEN SELLER AND PURCHASER CONCERNING THE SALE OF THE PROPERTY AND SUPERSEDES ALL PRIOR AGREEMENTS AND UNDERSTANDINGS, IF ANY, WITH REGARD THERETO, AND NO MODIFICATION HEREOF OR SUBSEQUENT AGREEMENT RELATIVE TO THE SUBJECT MATTER HEREOF SHALL BE BINDING ON EITHER PARTY UNLESS REDUCED TO WRITING AND SIGNED BY THE PARTY TO BE BOUND.**

(Def. Exh. A. P. 34)(emphasis in original)

An express integration clause such as section 16 of the P&S is evidence of a complete agreement. *Keller v. A.O. Smith Harvestore Products*, 819 P.2d 69, 72-73. Integration clauses result in prior agreements being merged into the final, formal contract executed by the parties. *Batterman v. Wells Fargo AG Credit Corp.*, 802 P.2d 1112 (Colo. App. 1990). Thus, even if the "Auction Agreement" were a contract between the parties, at the time the P&S was executed between SCA and FDIC, the "Auction Agreement" merged into the P&S. I now turn to the pertinent provisions of the P&S and the Right to decide if FDIC breached any agreement in providing seller financing to the Right assignee.

The Right provides in paragraph 1 that "[t]he partnership shall have thirty (30) days from the date of delivery of the Offer within which to elect to purchase the Property upon the same terms and conditions as set forth in the Offer ... "(Def. Exh. B)(emphasis added). Next, I look to the P&S to determine if seller financing was a term and condition of the SCA offer.

The P&S between SCA and FDIC provides that the transaction was a "financed sale." (Def. Exh. A p. 1-2) Also, it stated "[t]his Agreement is [a] ... seller-financed sale. [T]he Purchase Price consists of [] "Seller Financing Portion" in the amount of three million seventy five thousand ($3,075,000)." *Id.* At 1. Based on this language, it is crystal clear that the sale was based on seller financing.

SCA submitted an offer of $4.1 million, including seller financing. This is precisely the same offer FDIC submitted to the Right holder. Accordingly, the provisions of the Right and the terms and conditions of the offer were fulfilled. Under these circumstances, I conclude as a matter of law that there was no breach of contract based on FDIC providing seller financing to the Right assignee. Therefore, I will grant summary judgment in favor of FDIC and against SCA on its claim of breach of contract based on seller financing.

Breach of Fiduciary Duty

The parties move for summary judgment on the claim that FDIC breached its fiduciary duty to SCA. Because I find no fiduciary relationship existed between the parties, I grant summary judgment in favor of FDIC and against SCA.

SCA claims that a fiduciary relationship existed between SCA and FDIC based on the sales contract. (Plaintiff's brief p.9) Again, I disagree.

Under Colorado law, a fiduciary relationship exists when a special confidence justifiably is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 517 (Colo. 1986)(fiduciary relationship existed where broker exercised control over customer's accounts). The fiduciary relationship is formed when the parties understand that the fiduciary will act for the benefitv of the individual reposing trust. *Id. See also Klein v. Morgen*, 760 F.Supp. 1403 (D.Colo. 1991)(Absent showing of special relationship, physician had no fiduciary duty to patient's wife and child).

SCA has not pointed to any specific facts establishing a "special relationship" between SCA and FDIC upon which a fiduciary duty could be implied between the parties. Neither does SCA point to any authority, statutory or otherwise, which establishes an express fiduciary duty between the FDIC and potential purchasers of auction property. He undisputed facts show that the partners of SCA, Russell and Larry Cline, are attorneys licensed to practice in Colorado. (Def.Exh. E p. 71; Exh. F p.5) Moreover, the Clines had previous experience in the auction process. They acquired another facility from the Resolution Trust Corporation through a sealed bid auction in 1990. (Def.Exh. F p. 52-53). These undisputed facts establish that SCA and FDIC dealt with each other in an arms-length manner.

Under these circumstances, I conclude that as a matter of law, the FDIC owed no fiduciary duty to SCA. Consequently, I will grant summary judgment on behalf of FDIC and against SCA on the breach of fiduciary duty claim.

Accordingly, it is ORDERED that

1. upon motion of plaintiff, its claim for fraudulent misrepresentation is DISMISSED;
2. summary judgment is GRANTED in favor of defendant and against plaintiff on all remaining claims;
3. this action is DISMISSED with prejudice;
4. defendant is awarded costs;

5. judgment shall enter dismissing plaintiff's suit with prejudice.

6. the final trial preparation conference set for 8 a.m. on Thursday, November 17, 1994 and the trial scheduled December 19, 1994 are VACATED.

Dated: November 15, 1994 in Denver, Colorado.

BY THE COURT:
s/ LEWIS T. BABCOCK, JUDGE

APPENDIX E – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, Entered June 21, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-B-360

SPORTING CLUB ACQUISITIONS, LTD.,
Plaintiff,

vs.

THE FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant.

ORDER

Defendant Federal Deposit Insurance Corporation (FDIC), as receiver for Silverado Banking, Savings and Loan Association, moves pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6) to dismiss plaintiff Sporting Club Acquisitions, Ltd.'s (Sporting Club) fifth claim for relief. The motion is adequately briefed and oral argument will not materially aid to its resolution. Because 12 U.S.C. §1821(j) deprives me of the jurisdiction to order the relief requested, the FDIC's motion will be granted. The Sporting Club's fifth claim for relief will be dismissed with prejudice.

I.

In its fifth claim for relief, Sporting Club alleges that FDIC's sale of the property made the subject of this action to third parties who exercised a right of first refusal was invalid. Sporting Club seeks title to the property. Claims one through four state damage claims against the FDIC for breach of contract, fraudulent misrepresentation, and breach of fiduciary duty.

The FDIC acquired title to the property as the successful bidder at a public trustee's sale. Subsequently, the FDIC sold the property at is national auction to Sporting Club. The purchase and sale agreement (P&S) executed between FDIC and Sporting Club was subject to a first right of refusal whereby Olympia & York (O&Y) had the right to purchase the property on the same terms and conditions within 30 days after receiving notice of an outstanding offer. The P&S also stated that, upon its acceptance of a bid at the auction, the FDIC would notify the "right holder," so that this party could "exercise its right to purchase the property," and that, if this right was not timely exercised, "then seller and purchaser agree to close the sale as set forth in the agreement." As agreed, FDIC notified O&Y of Sporting Club's offer. Shortly thereafter, O&Y offered to sell the right of first refusal to Sporting Club for $250,000, but Sporting Club refused the offer. Within the required time period, FDIC notified Sporting Club that the right of first refusal was being exercised and that the P&S agreement was terminated.

In its fifth claim for relief, Sporting Club alleges that the FDIC auction, where it purchased the property, violated public policy. Sporting Club further contends that FDIC failed to comply with the terms and conditions of the auction because FDIC failed to notify the bidders that O&Y would be eligible for the same seller financing offered to Sporting Club.

II.

The dispositive question here is whether the anti-injunction provisions of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) preclude me from rescinding the sale of this property. If so, I lack the jurisdiction to award Sporting Club the relief it requests in its fifth claim.

The FDIC contends that 12 U.S.C. §1821(j) prohibits such relief. It reads:

> Except as provided in this section, no court may take any action, except at the request of the board of directors to restrain or affect the exercise of power or functions of the corporation as a conservator or receiver.

Pursuant to 12 U.S.C. §1821(d)(2)(B), the powers and duties of the FDIC include:

> The corporation may, as conservator or receiver --
> (I) take over the assets of and operate the insured depository institution with all the powers of the members of shareholders, the directors, and the officers of the institution and conduct all business of the institution;
> (ii) collect all obligations and money due the institution;
> (iii) perform all functions of the institution in the name of the institution which is consistent with the appointment as conservator or receive;
> (iv) preserve and conserve the assets and property of such institution.

As receiver, the FDIC is also authorized to liquidate and to proceed to realize upon the institution's assets. 12 U.S.C. §1821(d)(2)(E). In addition to its specific statutory powers, the FDIC is authorized to exercise "such incidental powers as shall be necessary to carry out such powers" and take any authorized action which it determines is in the best interest of the institution, its depositors or the FDIC. 12 U.S.C. §1821(d)(2)(J).

As the Sporting Club concedes, the FDIC was acting within its statutory directives when it sold the subject property at a public auction. The courts are prohibited by §1821(j) from enjoining the RTC's disposition of receivership assets unless the RTC is "acting clearly outside its statutory powers" under FIRREA. *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 102 (5th Cir. 1993)(quoting *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 407 (3rd Cir. 1992)). In *National Trust for Historic Preservation, et. al. v. Federal Deposit Ins. Corp.*, 21 F.3d 469 (D.C.Cir. 1994), the court, relying upon §1821(j), went even further. It refused to enjoin the sale of an historic building despite the sale's violation of the National Historic Preservation Act, 16 U.S.C. §§ 420 *et. Seq.* In this case, the FDIC was acting squarely within its statutory authority throughout the sale transaction. *See* 12 U.S.C. §1821(d)(2)(B), (d)(2)(E), and (d)(2)(J). Therefore, §1821(j) deprives me of jurisdiction to award the equitable relief that Sporting Club seeks in its fifth claim. *See Jenkins-Petre Partnership One v. Resolution Trust Corp.*, 1991 WL 160317, at *4 (D.Colo. August 13, 1991).

ACCORDINGLY, IT IS ORDERED THAT:

1) The FDIC's motion to dismiss Sporting Club's fifth claim for relief is GRANTED;

2) This claim is DISMISSED with prejudice.

Dated: June 21, 1994 in Denver, Colorado.

BY THE COURT:

s/ LEWIS T. BABCOCK, JUDGE

No. 95-1803

In the Supreme Court of the United States

OCTOBER TERM, 1995

SPORTING CLUB ACQUISITIONS, LTD., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the court of appeals correctly determined that a Federal Deposit Insurance Corporation (FDIC) asset sale may not be rescinded on petitioner's claim that the FDIC failed to maximize its recovery.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-15) is unpublished, but the decision is noted at 70 F.3d 1282 (Table). The order and judgment of the district court (Pet. App. 16-25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1995. A petition for rehearing was denied on January 31, 1996. Pet. App. 9. The petition for a writ of certiorari was filed on April 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) as receiver for Silverado Banking, Savings

and Loan Association, acquired title to the Cherry Creek Sporting Club (Club) through a public trustee's deed. Pet. App. 17. The Club was encumbered with a right of first refusal and purchase option (Right) held by Olympia & York Cherry Creek Co. (O&Y), and recorded in the records of Arapahoe County, Colorado. *Id.* at 18. The FDIC initially attempted to sell the Club at a sealed bid auction, but rejected as inadequate the high bid of $2.5 million. *Id.* at 17.

On December 14, 1993, the FDIC again offered the Club for sale, this time at public auction. It is undisputed that petitioner knew of the existence of the Right "well in advance" of this auction. Pet. App. 20. Moreover, prior to bidding, petitioner received a Property Information Packet, which included a copy of the Right, disclosed that the FDIC intended to afford the Right holder the opportunity to exercise the Right, and noted the Right as an exception to title. *Id.* at 18, 20.

At deposition, when asked whether he was ever informed that O&Y would *not* be allowed to assign or sell the Right, one of petitioner's partners responded: "No, we were never informed of anything like that." Pet. App. 21. The partner also testified that he "under[stood] that [petitioner] needed to exercise due diligence in . . . purchasing the property." *Ibid.*

At the public auction, petitioner made the high bid of $4.1 million, which the FDIC accepted, and a Purchase and Sale Agreement (P&S Agreement) was signed by petitioner and the FDIC. The P&S Agreement, which expressly recognized the Right and was conditioned upon the nonexercise of the Right by the "Right Holder," (Pet. App. 12) provided, in relevant part:

> The Seller and Purchaser acknowledge that the Property is subject to that certain First Right of Refusal * * * dated June 3, 1981 * * * and recorded on June 4, 1981, in Book 3425 at page 460 of the real property records of Arapahoe County, Colorado.
>
> Seller agrees that promptly upon execution of the Agreement * * *, Seller shall submit the Agreement * * * *to the party entitled to exercise the First Right of Refusal* (the "Right Holder") pursuant to the terms of the First Right of Refusal. If the Right Holder timely exercises its right to purchase the Property, the parties agree that: (i) such exercise shall not be deemed a default under the Agreement; (ii) the Agreement shall terminate; and (iii) Seller shall return the Initial Deposit and the Earnest Money to the Purchaser. If the Right Holder does not timely exercise its right to purchase the Property, then Seller and Purchaser agree to close the sale as set forth in the Agreement.

Id. at 20-21 (emphasis added).

After executing the P&S Agreement, the FDIC gave O&Y notice of petitioner's offer to purchase the Club. O&Y offered to sell the Right to petitioner for $250,000, but petitioner declined. Pet. App. 18. O&Y then sold the Right to another group, which exercised the Right and purchased the Club from the FDIC for petitioner's bid price of $4.1 million. The FDIC, in compliance with the P&S Agreement, immediately informed petitioner that the Right had been exercised, terminated the P&S Agreement, and refunded petitioner's earnest money. *Ibid.* Petitioner subsequently filed this action against the

FDIC, seeking specific performance and compensatory relief, and alleging fraud, breach of contract, and breach of fiduciary duty.

2. The district court dismissed petitioner's claims for specific performance and fraud,[1] then granted summary judgment to the FDIC on the remaining breach of contract and fiduciary duty claims. The court—considering both the P&S Agreement and the Right to which it expressly refers—ruled that the right of first refusal was an assignable property interest unlimited by any circumscribing contract provision. Pet. App. 18, 21. Nor did the FDIC breach its contract with petitioner by offering financing to the Right assignee, since the P&S Agreement provided expressly for such financing. *Id.* at 23. Lastly, the court found that, since no fiduciary relationship existed between petitioner and the FDIC, there could be no possible breach of fiduciary duty. *Id.* at 23-24.

3. The court of appeals affirmed. Pet. App. 10-15. The court found that the P&S Agreement could be nullified unqualifiedly by the "Right Holder," and refused petitioner's demand that "Right Holder" be interpreted as Right Holder "*at the time the operative purchase offer is communicated*," which would have precluded O&Y's assignment. *Id.* at 13 (emphasis added). No such limitation appeared in the

[1] The district court dismissed the specific performance claim on June 21, 1994, holding that 12 U.S.C. 1821(j) deprived the court of jurisdiction to grant specific performance against the FDIC. Pet. App. 26-29. Petitioner moved for clarification of that order, which the district court denied. *Id.* at 11. Petitioner then "confesse[d] to judgment" its fraudulent misrepresentation claim, seeking its dismissal, and the district court complied. *Id.* at 18.

"plain terms" of the P&S Agreement. *Ibid.* Further, the right of first refusal—a property right—is presumed freely assignable. Because no express prohibition on assignment appeared in the P&S Agreement, the court held that no possible breach could result from exercise of the Right by O&Y's assignee. *Ibid.*

The court also found no violation of the pertinent FIRREA[2] provision, 12 U.S.C. 1821(d)(13)(E), which requires the FDIC to maximize its return on asset sales.[3] First, the court found that petitioner failed to

[2] Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

[3] Section 1821(d)(13)(E) provides:

> In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which—
>
> (i) maximizes the net present value return from the sale or disposition of such assets;
>
> (ii) minimizes the amount of any loss realized in the resolution of cases;
>
> (iii) ensures adequate competition and fair and consistent treatment of offerors;
>
> (iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and
>
> (v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

show any asserted illegality in the FDIC's interpretation of the P&S Agreement. Pet. App. 13-14. In fact, the FDIC had made clear its intention to honor the Right, a fact known to all potential bidders, who could use that information and bid directly for the Club or obtain it indirectly via assignment of the Right from O&Y. *Id.* at 14. The court then observed that, while the post-auction assignment "may have been financially unwary," in that bidding competition "could conceivably" have been undermined, "there is no evidence that in fact happened here." *Ibid.* In any event, an asserted FDIC error in judgment does not constitute an illegal act under Section 1821(d)(13)(E): "[i]ndeed, if it did, every contractual arrangement with FDIC would involve enormous uncertainty—any misjudgment, oversight, or miscalculation revealed in hindsight as potentially detrimental to FDIC could lead to charges of illegality and consequent reformation or rescission of the transaction." Pet. App. 14. Finally, the court rejected petitioner's claim that the FDIC was precluded from offering seller financing to O&Y's assignee, and affirmed the district court's holding that the FDIC owed petitioner no fiduciary duties. *Id.* at 14-15.

ARGUMENT

1. Petitioner's contention (Pet. 4-5) that the FDIC did not maximize its return by failing to nullify O&Y's Right is meritless. Had no Right existed, there is no reason to believe that the Club would have fetched a price higher than the $4.1 million the FDIC received. Nor does petitioner offer any theory pursuant to which the monies paid to O&Y for the Right could have been received by the FDIC in the sale of the Club. Were O&Y itself to have exercised its Right to purchase the Club, rather than assigned its Right, the FDIC would have been no better off than it is now. Thus, there is no basis for petitioner's assertion that the FDIC did not maximize its return.

2. The FDIC's treatment of petitioner was not unfair. Pet. 5-6. Petitioner asserts that the FDIC should have nullified the Right held by O&Y. As authority for this position, petitioner invokes Section 1821(d)(2)(G)(i)(II), which permits the FDIC to transfer any receivership asset or liability without any approval, assignment, or consent.[4] The Right, however, was not an FDIC asset, but rather a property interest held by O&Y that preexisted, and was not altered by, FDIC's receiving title to the Club. As such, the Right was freely assignable by O&Y. Pet. App. 13 (citing *Scott* v. *Fox Bros. Enters., Inc.*, 667 P.2d 773, 774 (Colo. Ct. App. 1983), and *Clark* v. *Shelton*, 584 P.2d 875 (Utah 1978)). Petitioner offers no explanation for how the use of Section 1821(d)(2)(G)(i)(II) might have precluded O&Y from disposing of its Right. Properly applied to the facts of this case, Section 1821(d)(2)(G)(i)(II) means that the FDIC need not obtain approval, assignment, or consent to transfer the Club as an asset, but it does not affect O&Y's ability to exercise its preexisting Right in the eventual sale of the Club.

Petitioner insists that bidders were misled because the FDIC did not disclose that a post-auction assignee could exercise the Right. Pet. 5. This allega-

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[4] Section 1821(d)(2)(G)(i)(II) provides that "[t]he Corporation may, as conservator or receiver[,] * * * transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent with respect to such transfer."

tion is a restatement of its argument, rejected by the court of appeals, that "Right Holder" must be "understood as tacitly modified by some such phrase as 'at the time the operative purchase offer is communicated,' thereby precluding O&Y's assignment of the first right after learning of [petitioner's] bid." Pet. App. 13. No such limitation appears in the P&S Agreement and, as a property interest, the Right is "fully alienable, transferable, and assignable." *Id.* at 21.

Petitioner asserts that other court decisions conflict with the court of appeals' ruling in this case. Pet. 6. However, both court of appeals decisions cited by petitioner are inapposite. See *In re Chung King, Inc.*, 753 F.2d 547, 553-554 (7th Cir. 1985) (holding that bankruptcy court had abused its discretion by setting aside sale of asset it had previously approved because no fundamental mistake or error was made by the bankruptcy court in originally approving the sale); *In re Transcontinental Energy Corp.*, 683 F.2d 326, 328-329 (9th Cir. 1982) (rejecting arguments to nullify sale approved by bankruptcy court). Petitioner cites no case in which a court has interpreted Section 1821(d)(13)(E) in a way that would lead to a result different from the one reached in this case.

3. Petitioner misconstrues Section 1821(d)(13)(E)(i) as "mandatory" by not taking into account Section 1821(d)(13)(E)(ii). As noted above, no evidence exists that the FDIC failed to maximize its return on the sale of the Club. Moreover, had the FDIC attempted what petitioner suggests, it would merely have exchanged one lawsuit for another: O&Y could have sued alleging that the FDIC had improperly nullified its Right, which had been duly recorded. An action by O&Y would have caused the FDIC to incur litigation

costs (thereby diminishing the return on the sale of the Club), a result in conflict with 12 U.S.C. 1821(d)(13)(E)(ii), which requires that the FDIC "minimize[] the amount of any loss realized in the resolution of cases." Petitioner's argument that Section 1821(d)(13)(E)(i) should be read as mandatory thus conflicts with this Court's rulings that courts should "give effect, if possible, to every clause and word of a statute." *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) (citations omitted). The FDIC's reasonable decision to accept $4.1 million for the Club under these circumstances comports fully with subsections 1821(d)(13)(E)(i) and (ii), which must be read together.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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